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IN DER RECHTSGESCHICHTE, by Ulrich von  
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Hans Julius Wolff

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guide for those seeking perspective when dealing with the pressing problems of the day.

*Walter A. Chudson\**

REFLEXIONEN UBER SEIN UND WERDEN IN DER RECHTSGESCHICHTE, by Ulrich von Lübtow. Duncker & Humblot, Berlin, 1954. Pp. 61. DM.4.80.

There is agreement today among students of jurisprudence and legal history that law, being part of the general civilization of a people, is undergoing changes as this civilization develops and that, consequently, the legal notions and institutions of any given period or nation cannot be fully understood unless seen in the light of their historical antecedents and growth. Comparative legal history, on the other hand, has brought to light surprising similarities as to the laws of peoples that have reached comparable stages of social and economic development but otherwise are not connected by either a common origin or mutual cultural influences. These similarities are the greater the more primitive the respective stage of general civilization is; but while positive institutions and techniques may become increasingly different as the law grows more sophisticated, there are certain patterns of development which may differ from place to place, as far as their relative importance is concerned, but still can be observed over and over again and therefore appear to be typical. The result of the interplay of all these factors is a certain tension between the conservative trends necessarily inherent in all law and the forces pressing for new concepts and formations. The ultimate task of the legal historian, as it is conceived today, consists in elucidating the part these elements play in the evolution of the law and in discovering the religious, intellectual, social, economic, and political conditions that bring the various factors into action.

A number of problems involved in this situation, and especially as they apply to the history of Roman law, are the topics discussed by the author (who holds the chair of Roman law in the Free University of Berlin) in his little book of "reflexions on the stationary and the evolutionary in legal history." In the first chapter he dwells on the two possible attitudes of lawyers

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\* The author is a member of the United Nations Secretariat, but the opinions expressed are personal and do not necessarily reflect those of the Secretariat.

toward their own law, i.e., the "dynamic" approach resulting in constant adaptation through daily practice of the law to the changing needs of society—the most conspicuous historical examples being the activities of the Roman *praetor* and of the common law judges—and the "static" approach, sometimes detrimental to smooth and organic progress, which is found wherever the law is fixed once and for all by statute or based on a system of abstract concepts and axioms held to be absolute and immutable. This introductory analysis of attitudes is followed by a survey of the part the idea of evolution has played in the science of Roman law; here the role of the "Historical School" of Savigny and his successors and particularly the impulses owing to Rudolf von Jhering are duly emphasized. The third chapter contributes a brief discussion of typical patterns of evolution: basic legal forms and conceptions, while often endowed with considerable endurance and thereby, among conservative peoples like the Romans and the English, serving as a barrier against inorganic breaks and jumps in legal development, are also the starting points for innovations brought about by means of their progressively becoming more abstract and differentiated and by their being applied to practical purposes not originally envisaged. Some ideas concerning the methods and aims of present-day Roman law research are set forth in the final chapter.

All this is set before the reader with a considerable array of references to literature, not only legal but also historical and philosophical; in this respect it may be regretted that American writings—especially the works of Holmes, Cardozo, and Roscoe Pound, which contain much that would have suited the author's purpose—apparently were not available to him. There is no documentation from original sources but a great deal of exemplification, taken, as was natural for the author, mostly from the history of Roman law, but also from other laws, especially the English. Still, the presentation would have gained if the author had based it more strongly on truly comparative observation, thus giving more emphasis to the universal importance of the historical facts observed by him. There might also have been more concentration on the theme indicated by the title and perhaps a little less admixture of material the connection of which with the author's chief concern cannot always be easily discovered. One may, for instance, wonder if it was necessary to call back, by branding them once more as the sheer nonsense

they are, from their well-deserved oblivion some utterances on Roman law by ignorant Nazi writers.

The author certainly does not fail to stress the conservative trends that make for the continuity of legal systems by serving as correctives to the progressive and evolutionary forces; he in fact several times emphasizes the "polarity" which exists between the two tendencies. Nevertheless, this constant struggle between what is and what tends to evolve—in Roman law, in particular, the characteristic gap between a conservative clinging to traditional patterns and new social or political functions of the same old concepts and institutions—does not always emerge as markedly as it should. This is perhaps due to the fact that the author's description of the patterns of evolution is not exhaustive; for instance, he does not mention the role of fictions and other procedural techniques employed in putting old notions to new uses. From the point of view of general historical jurisprudence, the reviewer would also have appreciated it if the author had pointed out the different directions the evolution of legal systems will take according to whether or not progress is brought about by a class of trained specialists, and if so, whether the chief medium of progress is the drafting of instruments designed to give the proper legal form to new types of business transactions (as was the case in Hellenistic times), the decision of cases (as in Rome during the classical period and in the common law countries), or legislation and theoretical reflection (as in the late Roman Empire or in modern continental Europe).

In spite of these criticisms, however, the reviewer does not hesitate to characterize the book as a meritorious effort to point out certain aims, methods, and results of present-day research in legal history and to illustrate the importance which the study of Roman law, in particular, has in this connection. Its chief value lies in familiarizing non-specialists with what is one of the principal purposes of this science. It is believed that American readers, too, will be interested in this book, precisely because the study of Roman law, in spite of the fact that in classical times it was astoundingly close in spirit and methods to English law, is as yet not fully developed in the United States.

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